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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/642,716	08/18/2003	Stephen G. Kimmet	1-16294	4389

7590 03/10/2008  
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EXAMINER
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PUROL, DAVID M

ART UNIT	PAPER NUMBER
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3634

MAIL DATE	DELIVERY MODE
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03/10/2008

PAPER

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* STEPHEN G. KIMMET

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Appeal 2007-4509  
Application 10/642,716  
Technology Center 3600

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Decided: March 10, 2008

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Before WILLIAM F. PATE, III, TERRY J. OWENS,  
and JOHN C. KERINS, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Stephen G. Kimmet (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of Claims 1, 2, and 4-14. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We affirm-in-part.

## THE INVENTION

Appellants' claimed invention is to a folding panel assembly having only vertically-oriented frames disposed on separate spaced-apart partitions, with the frames being stationary with respect to the partitions and defining an opening, a plurality of folding panels, with a first panel mounted to the first frame and successive panels being supported solely by their preceding panel, wherein, when the panels are folded together at the first frame, access is allowed through the opening, and when the panels are unfolded to extend across the opening to the second frame, access through the opening is blocked. The claimed folding panel assembly is further stated as having an absence of any elements that would unite the folding panels to horizontal members that would span above and/or below the opening.

Claims 1 and 7, reproduced below, are representative of the subject matter on appeal.

1. A folding panel assembly, comprising:

only vertically-oriented frames, wherein first and second vertically-oriented frames are disposed on separate spaced apart partitions, the frames being stationary relative to the partitions and defining an opening; and

a plurality of folding panels, wherein a first panel is mounted to the first vertically-oriented frame and each successive panel is supported solely by its preceding panel;

the folding panel assembly having an absence of any elements that would unite the folding panels to horizontal members that would span above and/or below the opening;

wherein, when the panels are folded together at the first frame, access is allowed through the opening, and when the panels are unfolded to extend across the opening to the second frame, access through the opening is blocked.

7. A folding panel assembly, comprising:

only vertically-oriented frames, wherein first and second vertically-oriented frames are disposed on separate spaced apart partitions, the frames defining an opening;

a first plurality of folding panels having a first panel supported by the first frame and each successive panel is supported solely by its preceding panel; and

a second plurality of folding panels having a first panel supported by the second frame and each successive panel is supported solely by its preceding panel;

the folding panel assembly having an absence of any elements that would unite the folding panels to horizontal members that would span above and/or

below the opening;

wherein, when the first and second plurality of panels are folded together at the frames, access is allowed through the opening, and when the first and second plurality of panels are unfolded to extend across the opening, each panel having a furthest extended panel coming together, access through the opening is blocked.

#### THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Thun	US 3,811,489	May 21, 1974
Bruneau	US 4,431,044	Feb. 14, 1984
Dykes	US 5,598,667	Feb. 4, 1997

The following rejections are before us for review:

1. Claims 5 and 11 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to meet the enablement requirement.
2. Claims 1, 2, 5-9, 12, and 13 stand rejected under 35 U.S.C. § 103(a) as being obvious in view of the Bruneau patent.
3. Claims 4 and 10 stand rejected under 35 U.S.C. § 103(a) as being obvious over the Bruneau patent in view of the Dykes patent.
4. Claim 14 stands rejected under 35 U.S.C. § 103(a) as being obvious over the Bruneau patent in view of the Thun patent.

## ISSUES

A first issue raised in this appeal is whether Appellant has shown that the Examiner erred in concluding that Claims 5 and 11 are not enabled by Appellant's disclosure. A further issue raised in this appeal is whether Appellant has shown that the Examiner erred in determining that Claims 1, 2, 4, 6-10, and 12-14 obvious, and therefore unpatentable, under 35 U.S.C. § 103(a) in view of Bruneau (Claims 1, 2, 6-9, 12, and 13), or in view of Bruneau and the Dykes patent (Claims 4 and 10), or in view of Bruneau and the Thun patent (Claim 14).

## FINDINGS OF FACT

The following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. Appellant's Specification discloses that the folding panel assembly may include the use of a computer controlled display on the panel or panels. The sole disclosure of this optional embodiment is found in the Specification at page 7, lines 8-10 thereof.

2. A five-page printout directed to the evolution of electron luminescence is presented in Exhibit A in the Evidence Appendix of Appellant's Brief on Appeal. This document is relied on by Appellant as

evidence that Claims 5 and 11 on appeal meet the enablement standard set forth in the first paragraph of 35 U.S.C. § 112. Exhibit A contains no indication as to the origin of the document, nor does the Appeal Brief itself. According to a statement made in an Amendment filed by Appellant on August 16, 2004, the document could be found, at that time, at [www.limate.com](http://www.limate.com).

3. The Bruneau patent is generally directed to an apparatus designed to close off and provide a security barrier across an opening in a building. (Bruneau, Col. 1. ll. 2-3; Col. 3, ll. 16-17).

4. The Bruneau patent discloses a folding panel assembly in which a first of a plurality of panels is attached to a vertical frame by a hinged connection. (Bruneau, Fig. 5; Col. 6, ll. 24-26).

5. Bruneau discloses that the folding panel assembly is made up of a left-side folding panel assembly and a right-side folding panel assembly that are designed to meet in the center of the overall assembly. (Bruneau, Figs. 1, 6; Col. 3, ll. 37-38; Col. 6, ll. 33-39).

6. On each of the left-side and right-side assemblies in Bruneau, the successive panels are supported solely by the preceding panels. (Bruneau, Fig. 1).

7. Bruneau discloses the provision of locking brackets 10, 11 on the panels, which are adapted to aid in locking the panels in place, once the panels are positioned across an opening. Bruneau also provides the panels

with horizontally extending brackets or flanges 40, 41, at the upper and lower extents of the panels, in order to deter the use of prying instruments. Figures 2 and 3 show that the brackets 40, 41, are integrally formed with brackets 10, 11, respectively. (Bruneau, Figs. 1-3; Col. 3, l. 50-Col. 4, l. 37; Col. 6, ll. 15-19).

8. The vertically-oriented frame members 3, 4, in Bruneau span the full vertical distance of the opening in a building. (Bruneau, Fig. 1). The horizontal members 1, 2, in Bruneau do not extend above the top of, nor below the bottom of, the opening in the building. (Bruneau, Figs. 2, 3).

9. Bruneau discloses the use of L-shaped brackets 26 disposed centrally on the structure, to receive locking elements 25 actuated by lock 24. (Bruneau, Figs. 2, 3; Col. 5, ll. 38-44).

10. The Dykes patent discloses a folding panel assembly, in the form of a garage door or the like, which has decorative panels 30a-d that are removably attached to folding panels 18a-d. The panels 30a-d are slidably mounted within edge strips 32. (Dykes, Figs. 1, 2, 4, 5; Col. 5, ll. 21-31).

11. The Thun patent discloses a folding panel assembly having panels connected by hinges. The hinges between the panels are disclosed as having springs 58 to bias the hinged panels relative to one another. (Thun, Col. 5, ll. 15-19; ll. 39-63).

## PRINCIPLES OF LAW

The dispositive issue, insofar as the enablement requirement is concerned, is whether Appellant's disclosure, considering the level of ordinary skill in the art as of the date of Appellant's application, would have enabled a person of such skill to make and use Appellant's claimed invention without undue experimentation. *In re Strahilevitz*, 668 F.2d 1229, 1232 (CCPA 1982). In calling into question the enablement of Appellant's disclosure, the Examiner has the initial burden of advancing acceptable reasoning inconsistent with enablement so as to shift the burden to Appellant to show that one of ordinary skill in the art could have practiced the claimed invention without undue experimentation. *Id.*, *See also In re Marzocchi*, 439 F.2d 220 (CCPA 1971).

Factors to be considered in determining whether a disclosure would require undue experimentation include (1) the quantity of experimentation necessary, (2) the amount of direction or guidance presented, (3) the presence or absence of working examples, (4) the nature of the invention, (5) the state of the prior art, (6) the relative skill of those in the art, (7) the predictability or unpredictability of the art, and (8) the breadth of the claims. *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988).

The Supreme Court, in *Graham v. John Deere Co.*, 383 U.S. 1, 17-18, (1966), set out a framework for applying the statutory language of § 103:

[T]he scope and content of the prior art are to be determined; differences between the prior art and

the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

There is a need for caution in granting a patent based upon a combination of elements found in the prior art. In particular, a patent for a combination which only unites old elements with no change in the respective functions of the elements withdraws what is already known into the field of monopoly and diminishes the resources available to skillful practitioners. *KSR Int'l v. Teleflex Inc.*, 127 S.Ct. 1727, 1739 (2007).

## ANALYSIS

*Rejection of Claims 5 and 11 -- 35 U.S.C. § 112, first paragraph, enablement standard*

Each of Claims 5 and 11<sup>1</sup> sets forth that, “the panels comprise a computer controlled display.” (Appeal Br., Claims Appendix). The Examiner asserts that this subject matter is not described in the specification

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<sup>1</sup> Claim 5 depends from independent Claim 1, and Claim 11 depends from independent Claim 7.

in such a way as to enable one skilled in the art to make and/or use the invention.

Specifically, the Examiner states that, “[I]t is not known the structure and the software/hardware interface which comprises the computer controlled display.” (Answer 3). In reply, Appellant asserts that the field of computer controlled displays is a very mature field of art, as evidenced, for example, in Exhibit A included in the Evidence Appendix to Appellant’s Brief, which is a five-page document directed to the evolution of electron luminescence. (Finding of Fact 2). Appellant thus contends that persons skilled in the art of computer controlled displays would know of at least hundreds of ways to provide control for such a display on the panel of the present invention. (Appeal Br. 6).

There is nearly no disclosure as to how the invention would be implemented with a computer controlled display included on the panels<sup>2</sup>. Further, Exhibit A is of questionable origin<sup>3</sup> as well as of dubious value to

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<sup>2</sup> The *only* reference to such in the Specification states that, “[T]he panel 60 can be illuminated they [sic] can be computer controlled displays, or contain fluids and other objects.” (Finding of Fact 1).

<sup>3</sup> Exhibit A in the Evidence Appendix has no bibliographic information printed thereon, and Appellant does not provide that information in his Appeal Brief. In an Amendment filed August 16, 2004, when the document was initially submitted for consideration, Appellant states that the document is a history of electron luminescence that can be found at “www.limate.com”. (Finding of Fact 2).

the instant enablement analysis. However, it is not Appellant's burden, in the first instance, to establish that his claims are enabled. Rather, the Examiner must advance evidence or reasoning tending to show that undue experimentation would be required in order to bridge any gap between the teachings of Appellant's disclosure and the practice of the claimed invention by those of ordinary skill in the art. *In re Strahilevitz*, 668 F.2d at 1232 (PTO's burden of proof requires that the PTO advance acceptable reasoning inconsistent with enablement). We find that the Examiner here has failed to establish a *prima facie* case that the subject matter of Claims 5 and 11 is not enabled.

The purported *prima facie* case of lack of enablement is grounded entirely in the assertion that, “[I]t is not known the structure and the software/hardware interface which comprises the computer controlled display.” (Answer 3). As best understood by this panel, the Examiner is stating that Appellant's disclosure does not include any detail as to the structure of the computer controlled display, nor any detail as to the software/hardware interface for controlling the display. While true, the statements do not lead ineluctably to the conclusion that undue experimentation would be required of those skilled in the art to figure out how to make and use the invention in the claimed configuration in which the panels comprise a computer controlled display.

The statements are directed only to the second enumerated *Wands* factor, namely, the amount of guidance or direction provided by Appellant's disclosure. While this factor is indeed important, it is not by itself determinative, in the present situation, of a finding that undue experimentation on the part of persons of ordinary skill in the art would be required in order to practice the claimed invention.

The rejection of Claims 5 and 11 under 35 U.S.C. § 112, first paragraph, will be reversed.

Claims 5 and 11 are not presently subject to any rejection on prior art grounds. We note that Appellant's arguments and admissions regarding the widespread knowledge of computer controlled display technology and the mature nature of the art (Appeal Br. 6, 7), which are alleged to justify as enabling the mere mention of such a display being used on the claimed panel assembly, could likely be viewed as being probative of the possible lack of patentability of these claims.

*Obviousness Rejection of Claims 1, 2, 6-9, 12, and 13*

Claims 1, 2, 6-9, 12 and 13 are rejected under 35 U.S.C. § 103(a) in view of the Bruneau patent. Claims 1 and 7 are independent claims in this group, and Appellant argues separately for the patentability of each of these claims. No separate arguments were presented with respect to dependent

Claims 2, 6, 7, 8, 12, and 13, therefore each of these claims will stand or fall with the independent claim from which it depends.

We first address Appellant's contentions, made with respect to the rejection of both Claims 1 and 7, that the Bruneau patent and the claimed invention are non-analogous art, and that the functions of the Bruneau device and the claimed invention are completely different. (Appeal Br. 11-13; 16-17). Appellant carefully and narrowly characterizes the function of the Bruneau device as one of "deterrence of forced entry". (*See, e.g.*, Appeal Br. 12). Appellant then essentially ignores his own disclosure in asserting that *the* function (as if there were only one) of the claimed invention is to provide "privacy".

The title of the Bruneau patent evidences that it is directed to a "security closure apparatus". (Finding of Fact 3). Similarly, we need only go as far as Appellant's "Background of the Invention" in his Specification to see that his invention, "relates in general to a *security system* for a door, and in particular, to a *security system* for a cubicle...". (Specification, p. 1, ll. 17-19)(emphasis added). That the Bruneau device and the claimed device actually are provided to perform a similar function eviscerates considerable portions of Appellant's arguments on appeal.<sup>4</sup>

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<sup>4</sup> The Examiner also points out, to the extent that it might be relevant, that the Bruneau apparatus appears to inherently provide privacy in addition to security, even if not stated as a primary purpose or goal. (Answer 6, 7).

Appellant contends, in countering the rejection of Claim 1, that Bruneau does not disclose a folding panel assembly that has: (a) only vertically-oriented frames; (b) a plurality of folding panels in which each successive panel is supported solely by its preceding panel; and (c) an absence of any elements that would unite the folding panels to horizontal members that would span above and/or below the opening. The Examiner appears to agree with Appellant regarding element (c), but contends that it would have been obvious to eliminate such elements from the Bruneau device, with the attendant loss of the function of those elements. The Examiner otherwise contends that the elements referenced in (a) and (b) above are disclosed in the Bruneau patent.

We are not persuaded that the Examiner has erred in making this rejection. The first of the folding panels in the Bruneau folding panel assembly is attached only to a vertical frame (3, 4, at the opposing ends). (Finding of Fact 4). Further, as evidenced in the illustration in Figure 1 of Bruneau, each successive folding panel is supported solely by its preceding panel. (Finding of Fact 6). The panel assemblies as shown in that drawing figure are not supported by upper and lower runners 1, 2. That the panel assemblies or plurality of panels may later engage locking elements to hold the assemblies in a particular position does not negate the fact that the panels are supported solely by the preceding panels. Indeed, Appellant's panel assembly, once it is positioned across an opening, is disclosed as suitably

engaging locking elements that retain it in a particular position. (Specification, p. 5, l. 20-p. 6, l. 2). No material difference is seen, in this respect, between Appellant's claimed invention and the assembly disclosed in Bruneau.

This leaves us to consider the claim element (in actuality, a negative limitation) setting forth that the panel assembly has, "an absence of any elements that would unite the folding panels to horizontal members that would span above and/or below the opening". (Appeal Br., Claims Appendix). The Examiner, recognizing that this claim element was introduced into Claim 1 in an attempt to structurally define the invention over the structure disclosed in Bruneau, reasons that the omission of brackets 40, 41<sup>5</sup>, would result in an attendant loss of the locking function provided, and concludes that this would have been an obvious modification to persons of ordinary skill in the art. The Examiner cites to Section 2144.04 of the Manual of Patent Examining Procedure, which discusses a legal principle that our reviewing court long ago promulgated, namely that the elimination of an element of a device, together with its attendant

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<sup>5</sup> The locking brackets are actually designated by reference numerals 10, 11, whereas brackets 40, 41, are essentially horizontal flanges extending rearwardly at the upper and lower edges of the panels, to reduce the chances that a prybar or lever can be inserted behind the panel. (Finding of Fact 7). As illustrated in Figures 2 and 3, brackets 40, 41 appear to be integrally formed with brackets 10, 11, respectively. *Id.* Both Appellant and the Examiner refer to the entire bracket using reference numerals 40, 41.

function, is something that would be obvious to a person of ordinary skill in the art if the function was not desired. *In re Larson*, 340 F.2d at 969; *see also, In re Keegan*, 331 F.2d 315 (CCPA 1964); *In re Kuhle*, 526 F.2d 553 (CCPA 1975). In our view the holding relied on in citing *Larson* is perilously close to a *per se* rule on obviousness which is looked upon with disfavor by the Federal Circuit. *See In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995). Nonetheless, in this specific instance, it does appear that one of ordinary skill would have found it obvious to eliminate the brackets at issue and their concomitant locking function.

Appellant counters this assertion by arguing that, because a different function is provided by his invention, as compared with the function provided by the Bruneau device, this principle does not apply. As discussed previously, the evidence before us is that the present invention and the Bruneau device both are directed to providing a security function. We therefore find Appellant's position to be unpersuasive.

We further note that the element or limitation in question does not appear to distinguish the claimed invention from the structure disclosed in Bruneau, as a threshold matter. The claim refers to the absence of elements on the folding panel assembly that would unite the panels to horizontal members that would span, "above and/or below the opening". In an earlier passage in the claim, the "opening" is recited as being defined by the vertically-oriented frames. In the Bruneau patent, the vertically-oriented

frames 3, 4, extend or span the full vertical distance of the opening in a building, e.g., a window, with the “opening” thus spanning the same distance. (Finding of Fact 8). Horizontal members 1, 2, as seen in Figures 2, 3, do not span above the opening at the top, nor below the opening at the bottom, rather, they extend horizontally within the opening. *Id.*

Claim 7 differs from Claim 1 principally in reciting that the folding panel assembly is to have a first plurality of folding panels supported by a first frame, and a second plurality of folding panels supported by a second frame. (Appeal Br., Claims Appendix). The Examiner asserts that the Bruneau patent discloses this claim element, and, not unexpectedly, Appellant disagrees.

Appellant cites to Figure 1 of Bruneau, arguing that the left side of the structure has only one panel. (Appeal Br. 15). Appellant further contends that, even if the left side of the Bruneau structure had more than one panel, it is not possible to determine if the panels would possess the limitations in Claim 7, in that Bruneau does not illustrate the cooperation between panels on the left side. We find these arguments to be unpersuasive, and to be contradicted by the disclosure of Bruneau as a whole.

As pointed out by the Examiner (Appeal Br. 8), Bruneau states that, “[T]he shutter comprises two series of panels articulated with respect to each other...”. (Bruneau, Col. 3, ll. 37-38)(Finding of Fact 5). Bruneau also explicitly states that, “what has been described with respect to the right

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segments of the shutter applies to the left segments ...". (Bruneau, Col. 6, ll. 33-35)(Finding of Fact 5).

There are additional aspects of the Bruneau disclosure that would indicate to a person of ordinary skill in the art that Bruneau contemplates the use of two symmetrical panels. As but one example, lock 24 with locking elements 25 coact with L-shaped brackets 26 to lock the panels in place. (Finding of Fact 9). Those brackets are disposed at the center of the structure, a clear suggestion that the left-side and right-side panel assemblies would extend to the center of the structure.

Appellant has not shown through evidence or argument that the Examiner erred in rejecting Claims 1, 2, 6-9, 12, and 13 under 35 U.S.C. § 103(a) in view of Bruneau. We will affirm the rejection.

*Obviousness rejection of Claims 4 and 10*

Claims 4 and 10 depend from Claims 1 and 7, respectively, and call for the folding panel assembly to further comprise a decorative or descriptive panel removably attached to the folding panels, for changing an appearance of the panels. (Appeal Br., Claims Appendix). The Examiner rejects these claims as being obvious over the Bruneau patent, as discussed above, in view of the teaching in the Dykes patent of providing removable decorative panels on folding door panels. (Answer, 3-4; 7-8).

Appellant challenges the propriety of this rejection on the basis that the Dykes patent does not disclose the use of removably attached panels, alleging further that the Examiner has not demonstrated that Dykes teaches this claimed feature. (Appeal Br. 18). In addition, Appellant asserts that the removability of the decorative or descriptive panels from the folding panels provide the function of allowing for different appearances and/or for personalizing the panel assembly. (Appeal Br. 19).

Contrary to Appellant's position, the Dykes patent clearly discloses the use of decorative panels 30a-d that are removably attached to underlying folding panels 18a-d. (Finding of Fact 10). To the extent that the Examiner did not previously provide an independent detailed reading of the Dykes patent on the elements in Claims 4 and 10, he does so in the Examiner's Answer. (Answer 7-8). That the decorative panels in Dykes are removable leads to the conclusion that the functions discussed by Appellant as being

realized by the invention of Claims 4 and 10 can be realized as well with the decorative panels of Dykes.

Appellant further baldly states that there is no suggestion or motivation to modify or combine the teachings of Bruneau and Dykes, but provides no evidence or rationale in support of that contention.

Accordingly, we are unable to conclude that the rejection of Claims 4 and 10 under 35 U.S.C. § 103(a) is in error, and we will sustain the rejection.

*Obviousness rejection of Claim 14*

Claim 14 recites that a hinge, recited in Claim 13 as being disposed between each of the first and second frames and its respective first panel, includes a spring. The Examiner has concluded that it would have been obvious to provide springs for the hinges connecting the Bruneau panels 6 to the vertical frames 3, 4, in view of the disclosure in the Thun patent of providing a spring biasing to hinges between folding panels. (Answer 4; 8-9)(Finding of Fact 11).

Appellants position, in this regard, is that Claim 14 is patentable over the combination of Bruneau and Thun because the spring-biased hinges in the Thun patent are disposed only between the panels, and not between a vertical frame and a panel connected to the vertical frame. (Appeal Br. 20, 21). The Examiner's position is that the Thun patent is cited as showing that a spring-biased hinge is a common attribute for folding panels where it is

desired to have the panels biased to a predetermined position (Answer 8), and concludes that it would have been obvious to include a spring to bias the hinges connecting the panels to the frame in Bruneau in order to facilitate movement of the panels.

Appellant does not address the reasoning presented by the Examiner, and has thus failed to persuade us that the conclusion reached by the Examiner is erroneous. We will therefore affirm the rejection of Claim 14 under 35 U.S.C. § 103(a) in view of Bruneau and Thun.

#### CONCLUSIONS OF LAW

We conclude that the Appellant has established that reversible error exists in the rejection of Claims 5 and 11 under 35 U.S.C. § 112, first paragraph (enablement standard).

We conclude that Appellant has failed to establish that reversible error exists in the rejection of Claims 1,2, 6-9, 12, and 13 under 35 U.S.C. § 103(a) as being unpatentable over the Bruneau patent.

We also conclude that Appellant has failed to establish that reversible error exists in the rejection of Claims 4 and 10 under 35 U.S.C. § 103(a) as being unpatentable over Bruneau and Dykes.

We further conclude that Appellant has failed to establish that reversible error exists in the rejection of Claim 14 under 35 U.S.C. § 103(a) as being unpatentable over Bruneau and Thun.

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ORDER

The decision of the Examiner to reject Claims 5 and 11 under 35 U.S.C. § 112, first paragraph, is REVERSED.

The decision of the Examiner to reject Claims 1, 2, 6-9, 12, and 13 under 35 U.S.C. § 103(a) is AFFIRMED.

The decision of the Examiner to reject Claims 4 and 10 under 35 U.S.C. § 103(a) is AFFIRMED.

The decision of the Examiner to reject Claim 14 under 35 U.S.C. § 103(a) is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).-

AFFIRMED-IN-PART

jlb

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